

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROGER WAYNE SUNDAY

Claimant

VS.

AMERICAN INSULATED WIRE

Respondent

AND

**TRAVELERS INSURANCE COMPANY,
PHOENIX INSURANCE COMPANY and
OLD REPUBLIC INSURANCE COMPANY**

Insurance Carriers

Docket No. 1,021,024

ORDER

Respondent and its three insurance carriers appeal the preliminary hearing Order of Administrative Law Judge Thomas Klein dated April 8, 2005. Claimant was awarded benefits in the form of medical treatment for his shoulders and his neck for injuries suffered either in February 2003, by a new aggravation in August 2004 or by a series of microtraumas over the entire time of claimant's employment. Respondent's insurance carriers were ordered to split the cost of claimant's continuing medical treatment, with respondent being required to provide a list of three physicians from which claimant would choose an authorized physician for treatment to his neck and shoulders.

ISSUES

Did claimant suffer accidental injury arising out of and in the course of his employment to his right shoulder and neck? The parties acknowledge claimant suffered injury to his left upper extremity at the shoulder, with that injury not being contested and with medical treatment being voluntarily provided. However, respondent disputes that claimant's right shoulder and neck symptoms were caused by any involvement with claimant's employment, arguing that they did not arise out of and in the course of that employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented, the Appeals Board (Board) finds the preliminary hearing Order of the Administrative Law Judge should be affirmed to award

claimant ongoing medical care for the left upper extremity at the shoulder, but reversed with regard to medical care ordered for the right shoulder and neck.

Claimant, a rod mill worker for respondent, was involved in work activities which daily required he lift heavy objects overhead. In February 2003, while lifting, claimant felt a pop in his left shoulder. The left shoulder problems gradually grew worse, and claimant advised Alvie Hornberg, the "safety guy,"¹ of the difficulties. Claimant was referred for treatment to Kenneth W. Johnson, M.D. Claimant underwent conservative care and continued performing his regular duties for respondent.

Claimant's shoulder pain gradually improved until the summer of 2004. Beginning in June 2004, claimant testified that his shoulder condition worsened and improved several times. Then in August 2004, claimant had what he described as a long day, a bad day, resulting in his shoulder becoming the worst ever. He advised Mr. Hornberg (the "safety guy") and his supervisor and was returned to medical care. He was initially referred to Dr. Block (the company physician) and Barry Phillips (Dr. Block's physician's assistant) and was then returned to Dr. Johnson on September 14, 2004, at which time he was taken off work.

Claimant was later referred to Kevin M. Mosier, M.D., and again underwent conservative care. On October 27, 2004, he advised Dr. Mosier that he was also having difficulties with his right shoulder, which he advised was similar to the problems in the left shoulder, but to a lesser degree. There is no indication in Dr. Mosier's October 27, 2004 progress note as to how claimant suffered injury to his right shoulder. MRIs performed on the left shoulder on September 13, 2004, indicated an abnormal signal in the inferior aspect of the supraspinatus at its insertion site, which Dr. Mosier indicated represented a small partial tear. The medical treatment for claimant's left shoulder continued until he was released to return to work with restrictions. Those restrictions, which are contained in the Labette County Medical Center work status report of February 14, 2005, restrict claimant from lifting over 50 pounds with the left arm and restrict claimant from lifting above the left shoulder. The release to return to work was dated for Wednesday, February 16, 2005. There is no indication in any of these reports that claimant was receiving any type of treatment for his right shoulder.

Claimant was referred to Pedro A. Murati, M.D., for an evaluation by his attorney, with the evaluation occurring on February 7, 2005. Claimant advised Dr. Murati of his left and right shoulder difficulties, with Dr. Murati diagnosing a small tear or partial tear in the left rotator cuff and a small left joint effusion. Dr. Murati's report indicates claimant underwent surgery for bursitis bone spurs of the left shoulder, but it discusses no treatment

¹ P.H. Trans. at 12.

to the right shoulder. The report indicates claimant's right shoulder complaints appeared after the left shoulder complaints, and further states that claimant had popping, stiffness and soreness in his neck in the mornings. This is the first indication in this record of any neck involvement.

When claimant testified at preliminary hearing, he was asked on cross-examination how the problems with the right shoulder occurred. Claimant described an incident at Blockbuster Video, when he was reaching high on a shelf in order to obtain a movie, when his shoulder started to pop. He acknowledged at preliminary hearing that this was the first problem that he had experienced with his right shoulder. Claimant was also asked about the possibility of neck problems, and testified that he had not discussed neck problems with any physician at any time prior to seeing Dr. Murati. Additionally, claimant failed to testify at preliminary hearing regarding any involvement of his neck with any work-related accident.

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.² The ALJ, in his April 8, 2005 preliminary hearing Order, awarded medical treatment for the left and right shoulders and the neck. However, this record does not support a finding that claimant suffered accidental injury to his right shoulder or his neck while employed with respondent. The only injury description provided by claimant to the right shoulder occurred at Blockbuster Video. This non-work-related incident did not occur until approximately October 27, 2004, several weeks after he had been taken off work by Dr. Johnson.

Likewise, with the neck, claimant failed to mention any work-related accident or incident which may have caused him injury to his neck. The only mention of the neck is contained in the report of Dr. Murati, wherein Dr. Murati discusses claimant's neck popping and being stiff and sore in the mornings. Claimant acknowledged at preliminary hearing that he had not discussed the neck problems with any physician prior to seeing Dr. Murati in February of 2005. The Board does not find that claimant has proven by a preponderance of the credible evidence that he suffered accidental injury to his right shoulder or neck during his employment with respondent. Therefore, the order by the ALJ that claimant is entitled to medical benefits for those conditions is reversed.

With regard to the left upper extremity, the only dispute centers around which insurance company will pay for the treatment. The ALJ determined that the insurance

² K.S.A. 44-501 and K.S.A. 44-508(g).

companies would split the cost of claimant's continuing treatment until "the situation further clarifies."³

The Board has stated on numerous occasions that issues regarding the date of accident or disputes between insurance carriers concerning which of them is to pay the cost of ordered preliminary hearing benefits are not jurisdictional.⁴

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge Thomas Klein dated April 8, 2005, should be, and is hereby, affirmed with regard to the left upper extremity at the shoulder and reversed with regard to the right upper extremity at the shoulder and the neck.

IT IS SO ORDERED.

Dated this ____ day of June 2005.

BOARD MEMBER

c: Michael L. Snider, Attorney for Claimant
Stephen J. Jones, Attorney for Respondent and its Insurance Carrier Old Republic Insurance Company
William L. Townsley, III, Attorney for Respondent and its Insurance Carriers Travelers/Phoenix Insurance Companies
Thomas Klein, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

³ Preliminary hearing Order (April 8, 2005) at 2, paragraph 5.

⁴ *Goitia v. Southwest Developmental Services, Inc., and Bethphage/Advent Services, Inc.*, Nos. 233,983 and 245,196, 2000 WL 137183 (Kan WCAB Jan. 6, 2000); *Ireland v. Ireland Court Reporting*, Nos. 176,441 and 234,974, 1999 WL 123220 (Kan. WCAB Feb. 22, 1999).